In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1393

JOHN NUCCIO, ROSARIO LUPO AND WILLIAM CURCURATO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were convicted on a single-count indictment in the United States District Court for the Eastern District of New York for conspiracy to violate the narcotics laws of the United States. They were sentenced to imprisonment for terms varying from twelve years to fifteen years. The court of appeals affirmed the convictions (373 F. 2d 168) and this Court denied a joint petition for a writ of certiorari on May 15, 1967 (387 U.S. 906).

On November 14, 1967, petitioners filed in the district court a motion for a new trial "on grounds of newly discovered evidence" (R. 1–2), attaching an

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of the interviews at the Federal Detention House (R. 23–27; G. App. 8a–10a).[4]

On December 15, 1967, after extensive argument, the district court denied the motion for a new trial without a hearing on the basis of the affidavits (Arg. Tr. 39). The court of appeals affirmed the order of the district court from the bench without written opinion on April 8, 1968.

Petitioner's only contention is that the district court abused its discretion in denying the motion for a new trial without conducting an evidentiary hearing (Pet. 2–10). It is settled, however, that a motion for a new trial based on newly discovered evidence is a matter within the sound discretion of the court and may be decided on affidavits without holding a hearing. *E.g.*, *United States* v. *Johnson*, 327 U.S. 106; *United States* v. *Crowder*, 351 F. 2d 101 (C.A. 6); *United States* v. *Astore*, 309 F. 2d 144 (C.A. 2); *United States* v. *On Lee*, 201 F. 2d 722 (C.A. 2), certiorari denied, 345 U.S. 936. The only "new" allegation in the affidavits was that during Henrypierre's incarceration at the Federal Detention Home in New York City he told three convicted felons that federal agents were attempting to coerce him into falsely identifying pictures of petitioners as co-conspirators when, in fact, he had never seen them before.[5] Even if one credited

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[4] Henrypierre received a suspended sentence and was deported to France. He was not available at the time of the instant motion (Arg. Tr. 17, 28–29, 35–36).

[5] Henrypierre testified at trial that he was interrogated by federal agents during his incarceration, that he was told he could go to jail for five to twenty years and could help himself

the claim that Henrypierre told his cellmates such a story, it occurred during a period when he was also protesting his own innocence and claiming no knowledge whatsoever of the narcotics in his possession when he was arrested. It would have only limited impeaching value after Henrypierre admitted his own extensive narcotics activities over a long period of time and decided to cooperate with the government.

Moreover, the statements attributed to Henrypierre are incredible when viewed in light of the opposing government affidavits and the trial record itself.[6] The government's affidavits showed unequivocally that petitioners were not known to any of the investigating agents during the period that Henrypierre was at the Federal Detention House, and that pictures were not shown to Henrypierre until after he decided to cooperate and was incarcerated elsewhere. The trial judge, who had presided at the original trial, had had the opportunity to observe Henrypierre and relate his testimony to corroborating testimony of other witnesses. Henrypierre's testimony at trial was detailed with independently established facts that he could not have known unless they were true. He knew about, had keys for and visited two apartments rented by petitioner Curcurato under the name of Michael

by cooperating. Petitioners knew of his homosexual propensities from the beginning. All of these factors were explored on cross-examination and in rebuttal testimony.

[6] The evidence at trial is summarized in the opinion of the court of appeals on direct appeal (373 F. 2d 168, 170) and the government's brief in opposition in this Court (No. 1190, O.T. 1966, pp. 2–4).

Roma. He knew petitioner Lupo by the name of Joe and gave the address of Lupo's apartment rented under the name of Joseph Russo. Henrypierre knew the New Jersey telephone number of one Rose Carluccio, which he called each time to make arrangements to pick up payment for the narcotics from petitioner Nuccio. Rose Carluccio was present at least four or five times when Henrypierre met Nuccio at the appointed place. These facts, among others, were fully corroborated at trial by investigating agents, petitioners' landlords and neighbors and Rose Carluccio.

On this state of the record, it is hardly surprising that the trial judge concluded that there was not a "sharp divergence of fact" and "in light of what the affidavits contain, in a case which I heard tried, the record of Mainer and everything else produced in connection with this application * * * I feel that I can on the basis of what has been produced, decide this application" (Arg. Tr. 38039).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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